United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

76-1042

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P/S

To be argued by
THOMAS E. ENGEL

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-1042

UNITED STATES OF AMERICA,
Appellee,

—v.—

FERNANDO PADRON, RUBEN LOPEZ,
and WALTER SINTSCHA,
Defendant-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

ROBERT B. FISKE, JR.,
United States Attorney for the Southern District of New York, Attorney for the United States of America.

THOMAS E. ENGEL,
LAWRENCE B. PEDOWITZ,
Assistant United States Attorneys, Of Counsel.

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Preliminary Statement

Fernando Padron, Ruben Lopez, and Walter Sintscha appeal from judgments of conviction entered on January 28, 1976 and January 31, 1976 in the United States District Court for the Southern District of New York, after a four-day trial before the Honorable Milton Pollack, United States District Judge, and a jury.

Indictment 75 Cr. 938, filed September 25, 1975, charged Padron, Lopez, and Sintscha, and three co-defendants, Edward Montiell,* Armando Delbarrio and

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* The defendant Montiell, no stranger to this Court, see *United States* v. *Montiell*, 526 F.2d 1008 (2d Cir. 1975), was acquitted on Count One, the only count in which he was charged.

Paula Delbarrio,* with violations of the federal narcotics laws. Count One of the Indictment charged all six defendants with conspiracy to violate the federal narcotics laws in violation of Title 21, United States Code, Section 846. Count Two charged Sintscha with distributing 6.5 grams of cocaine on July 10, 1975. Count Three charged Ruben Lopez and Walter Sintscha with distributing 28 grams of cocaine on July 23, 1975. Count Four charged Padron, Sintscha, Montiell and Armando Delbarrio with distributing 98.5 grams of cocaine on July 25, 1975.** Count Five charged Lopez and Sintscha with distributing two ounces of cocaine on August 7, 1975. Count Six charged Armando Delbarrio and Paula Delbarrio with distributing 0.1 gram of cocaine on August 14, 1975. Count Seven charged Sintscha with distributing one quarter of an ounce of cocaine on September 10, 1975. The six substantive counts of distributing and possessing with intent to distribute cocaine were charged as violations of Title 21, United States Code, Sections 812, 841(a)(1) and 841(b)(1)(A).

Trial commenced December 5, 1975 and concluded on December 10, 1975 when the jury found Padron guilty on Count One, Lopez guilty on Counts One and Five, and Sintscha guilty on Counts One, Two, Three, Four, Five and Seven.

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* The defendant Armando Delbarrio pleaded guilty to Counts Four and Six of the Indictment on November 19, 1975. On the same date Paula Delbarrio was granted a severance. On January 21, 1976 Armando Delbarrio was sentenced as a Young Adult Offender, pursuant to the terms of 18 U.S.C. § 5010(b), to the custody of the Attorney General and to a special parole term of three years. Count One was dismissed as to Armando Delbarrio at the time of sentence.

** Count Four was dismissed prior to trial as to Montiell and Padron because the sale took place in Queens County, making venue in the Southern District of New York improper.

On January 28, 1976, Padron was sentenced as a Young Adult Offender pursuant to the terms of 18 U.S.C. § 5010(b) to the custody of the Attorney General, all but six months of which custody was to be suspended, to be followed by a term of probation of three years to run concurrently with a special parole term of three years.

On January 28, 1976, Lopez was sentenced to concurrent terms of imprisonment of two years on Counts One and Five, to be followed by a three-year special parole term.

On January 31, 1976, Sintscha was sentenced to concurrent five year terms of imprisonment on Counts One, Two, Three, Four, Five and Seven, to be followed by a special parole term of three years.

Padron is at liberty pending the outcome of this appeal. Lopez and Sintscha are serving their sentences.

Statement of Facts

The Government's Case

The narcotics conspiracy which was charged in the indictment and overwhelmingly proven at trial consisted of a loose-knit group of cocaine wholesalers in Manhattan and Queens dealing in cocaine of remarkably high purity.* The proof came principally from an undercover police officer of the New York City Police Department, Stephen Caracappa, who purchased cocaine from the defendants, who were ready suppliers.

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* The cocaine introduced at trial against these defendants ranged in purity from 64.6% to 89%. (GX 2, 12; Tr. 141-42, 174).

On July 10, 1975, Officer Caracappa and a confidential informant named Pat met with the defendant Walter Sintscha in a car outside 66 West 84th Street. Sintscha promptly informed Caracappa that he would sell a quarter ounce of cocaine for $475 and that he expected to have it in 15 minutes. (Tr. 18-20, 95-98, 110-16, 137-38, 236, 298, 302-03, 306-09).* After a brief interval, Sintscha and Caracappa proceeded to Sintscha's apartment at 66 West 84th Street where Sintscha handed Caracappa an envelope which contained 6.5 grams of cocaine in a plastic bag. (GX 2; Tr. 138-39, 141-42, 210). Caracappa paid Sintscha $475 and left the apartment. (Tr. 139).

On July 22, 1975, Caracappa called Sintscha and agreed to purchase an ounce of cocaine for $1,600. (GX 3, 3-A).** They met later that day at the Klondike Bar on Columbus Avenue at 85th Street where Sintscha promised to deliver the ounce the following day and to supply four to six ounces later in the week. (Tr. 21, 144-45, 287).

The following day at approximately 6 p.m. surveillance agents located in the vicinity of Sintscha's apartment saw the defendant Ruben Lopez drive Sintscha's blue Toyota from Sintscha's residence to the Queens Midtown Tunnel where surveillance was discontinued. The agents photo-

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* Citations to the trial transcript are designated by the prefix "Tr." Citations to the Joint Appendix filed by appellants are designated by the prefix "Joint App." Citations to the appellants' briefs are designated by the prefix "Br." followed by the name of the particular appellant. Citations to Government Exhibits are designated by the prefix "GX." Citations to the Government's Appendix are designated by the prefix "G. App."

** This phone call, among several others, was recorded and was played for the jurors who were provided transcripts. The tape and transcript were both received in evidence as Government Exhibits 3 and 3-A. Tapes and transcripts of subsequent phone calls between Caracappa and Sintscha were received as Government Exhibits 4 and 4-A, 7 and 7-A, 8 and 8-A, 10 and 10-A, and 11 and 11-A.

graphed Lopez in the vicinity of Lexington Avenue and 44th Street prior to his departure for Queens. (GX 17; Tr. 22-25, 269-70).

While the surveillance agents were following Lopez, Detective Caracappa twice called Sintscha and agreed to meet later that evening in front of Sintscha's apartment. (GX 4, 4-A; Tr. 145-46). They thereafter met, and at approximately 7:15 p.m., they proceeded to the Three Brothers Restaurant which was located nearby. (Tr. 147-48, 270). At approximately 8 p.m., the blue Toyota which Lopez had been seen driving was observed parked at the intersection of Columbus Avenue and 84th Street, near the location of the initial surveillance. (Tr. 25-26).

Meanwhile, Sintscha made a phone call from the restaurant, left the restaurant, and returned to 66 West 84th Street. Ten minutes later he re-emerged from the building and went to Detective Caracappa's undercover vehicle. There, he gave Caracappa a clear plastic bag containing 28 grams of cocaine and in turn received $1600. (GX 5; Tr. 25-26, 147-48, 270-71).

The next day, July 24, 1975, Caracappa returned to Sintscha's apartment and was admitted into Sintscha's apartment by the defendant Fernando Padron. Padron asked about Caracappa's interest in "ups" and "downs." Padron then stated that he had cocaine for sale but was reluctant to quote a price, because Caracappa was Sintscha's customer. (Tr. 150). Shortly thereafter, Sintscha arrived and left immediately with Caracappa.

Later, at Victor's Cafe, at 71st Street and Columbus Avenue, Sintscha told Caracappa that he would have eight ounces of cocaine available the following day, four ounces from Manhattan and four ounces from Queens. (Tr. 26-27, 150-51).

The following day, Sintscha and Detective Caracappa again met in the vicinity of Sintscha's apartment. After a 45 minute delay inside Sintscha's apartment during which time Sintscha made and received several phone calls, Sintscha said that everything was ready in Queens. (Tr. 151). Sintscha then drove to Queens over the 59th Street Bridge, followed by Caracappa in his undercover vehicle, and met Padron at a gas station. Padron made a phone call and reported to Caracappa that the connection would be there in a few minutes. Shortly thereafter, Padron crossed the street and met the defendant Armando Delbarrio. Padron then returned to Officer Caracappa and told him that they would have to travel further to get the four ounces. Caracappa demurred and told Padron he wanted to speak to the connection. Padron spoke again with Delbarrio, returned to Caracappa and told him that the deal would take place in Delbarrio's apartment. (Tr. 152). Sintscha and Caracappa, in one car, then followed Delbarrio and Padron, in another car, to 169-17 Highland Avenue, Queens, where Delbarrio lived.

Once the group had arrived at Delbarrio's residence, Delbarrio was introduced to Caracappa by Padron. An hour or two afterwards, the defendant Edward Montiell arrived and handed Delbarrio a package wrapped up in a scarf. (Tr. 153-54). Delbarrio then weighed the package and discovered that it was less than the full four ounces promised and, after conferring with Padron and Montiell, said that the package would cost $5,000. (Tr. 154). Caracappa then field tested the cocaine with positive results, retrieved $5,000 from his car, and exchanged the money for the cocaine. (GX 6; Tr. 30-31, 155, 180-81, 227-28, 224, 246).

Detective Caracappa and Sintscha met again in Victor's Cafe on July 31, 1975 and discussed a possible four ounce transaction. (Tr. 31-32, 128, 156-57). This conversation was followed by telephone negotiations, on August 5 and 6, 1975. (GX 7, 7-A, 8, 8-A; Tr. 157-59).

On the afternoon of August 6th, Caracappa met Sintscha and the defendant Lopez, who was introduced as "John" in front of 66 West 84th Street and thereafter drove to O'Neal's Bar. (Tr. 32, 161, 196). Lopez told Caracappa that he was Sintscha's connection and that he wanted to sell Caracappa a half kilogram of cocaine. The Detective declined, but offered to purchase two ounces from Lopez. Lopez demanded the money in advance, and Caracappa refused. Lopez said he would try to get two ounces for the following day at a total price of $3,000. Lopez told Caracappa that he had been the source for Sintscha when he had delivered an ounce to Caracappa on July 23, 1975. (Tr. 162).

The next day, August 7, 1975, Caracappa met Sintscha and returned to his apartment. Lopez arrived with two plastic bags containing approximately two ounces of cocaine and gave them to Sintscha.* A field test of the powder revealed the presence of cocaine, and Caracappa then paid $3,000 to Sintscha who, in turn, handed the money to Lopez. (GX 9; Tr. 163-65, 200-06). Lopez said he would try to supply more cocaine to Caracappa, but requested that the money be paid in advance. (Tr. 163).

Lopez and Sintscha met Detective Caracappa again during the evening hours of August 18, 1975. Sintscha and Lopez had moved by that time and were living at 321 East 22nd Street. That evening Caracappa showed the two men $18,000 in cash in the trunk of his car which he told them was for the purchase of a half pound of cocaine. The deal was not consummated that evening. (Tr. 36, 166-67, 207-09).

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* Lopez had been observed this same day by surveillance agents to drive from 66 West 84th Street to 89-50 56th Street in Queens, where he announced himself at the outside door as "Rubin" (*sic*). (Tr. 290).

On the following day, Detective Caracappa met Sintscha in the vicinity of 23rd Street and Second Avenue. Together with Lopez's girlfriend, a woman named Carmen, they waited for the appearance of Lopez who disappointed them. (Tr. 40, 167). Sintscha and Caracappa met again on August 25th. Sintscha assured Caracappa that Lopez was trying to procure narcotics, but again nothing happened. (Tr. 38, 168). On August 28, 1975 Sintscha called Caracappa and promised to supply, at a minimum, a quarter kilogram of cocaine. (GX 10, 10-A; Tr. 169-70). On September 4, 1975, Caracappa and Sintscha again negotiated for more cocaine but with no success. (GX 11, 11-A; Tr. 170-71).

After a meeting on September 9, 1975, Detective Caracappa and Sintscha met on September 10th in Sintscha's apartment. Sintscha said "John" was bringing the narcotics. Sintscha then left his apartment and returned with a plastic bag containing one quarter ounce of cocaine. (GX 12; Tr. 172-74). When the Detective and Sintscha walked to Caracappa's car, purportedly to get the money to pay Sintscha, Sintscha was arrested by New York Drug Enforcement Task Force personnel. (Tr. 44-45, 173). Lopez was arrested immediately thereafter. (Tr. 46). Padron was arrested during the early morning hours of the following day, September 11, 1975.

The Defense Case

1. Edward Montiell

The defendant Montiell called his wife Neida to testify that Agent Phillip Hayward called her husband frequently during July, 1975. (Tr. 328-29.)*

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* Neida Montiell is the subject of the complaint in *United States* v. *Neida Montiell*, 76 M. 429, alleging a violation, *inter alia*, of Title 21, United States Code, Section 846.

2. Ruben Lopez

Ruben Lopez called Assistant United States Attorney Thomas E. Engel who testified that on November 11, 1975 he opened two plastic bags containing Government Exhibits 13 and 14 which were address and appointment books confiscated from the defendant Sintscha at the time of his arrest. (Tr. 336-37).

3. Walter Sintscha

Walter Sintscha called Detective Stephen Caracappa to testify to the purpose of a phone call on September 8, 1975 which Caracappa had made to Sintscha's employer, the Metropolitan Life Insurance Company. (Tr. 340-44).

ARGUMENT

POINT I

The trial court properly denied without a hearing Lopez's motions for a new trial.

Lopez and Padron argue that it was error for the District Judge to deny, without a hearing, a motion for a new trial based on the prosecutor's alleged failure to turn over certain *3500* material. This argument is meritless.

During the cross-examination of Agent Patrick Bradley, the agent testified that he had prepared over ten reports in this case and prior to trial had reviewed all of these reports as well as the reports of other agents. When defense counsel asked whether the agent had taken

any contemperaneous notes of his surveillance of the defendants, he replied that such notes had been prepared and that he had reviewed them before testifying.* The agent further testified that, except for a possible rough draft of his reports, the prosecutor had all of his notes. (Tr. 72-74). Defense counsel asked no questions whatsoever of the agent as to whether he had ever seen the prosecutor take notes of his interviews, whether he had ever been read back or shown any such notes, or whether he had ever approved or adopted any notes.

Approximately one week after the jury returned its verdict of guilty, Lopez moved the trial court for a new trial and an evidentiary hearing on the grounds that Lopez's lawyer had seen, during the jury's deliberations, a document on the prosecution table which he concluded should have been turned over as *3500* material in con-

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* Lopez's and Padron's artful attempts to imply that the witness was asked about any and all notes, whether his own or the prosecutor's, and that the witness denied the existence of any such notes, do not withstand the most cursory examination of the record. The inquiries by defense counsel concerned only notes prepared by the witness himself at a time rougly contemporaneous with the observations to which he testified at trial. The pertinent portion of the record is as follows:

"Q. And did you prepare a number of D.E.A.6's in this case? A. Yes, sir.

Q. Do you know approximately how many? A. I would say in excess of ten.

Q. And some of them are fairly lengthy, aren't they? A. Some of them are, yes.

Q. Single space and they run for several pages? A. Yes, sir.

Q. And are they signed? A. Yes, sir.

Q. And who are they signed by? A. First they are signed by the agent who writes them or prepares them, and they are countersigned by the group supervisor of that—of the group in which the agent is operating.

[Footnote continued on following page]

Q. And pursuant to D.E.A. practice, do you put in all of the details that you observe in the D.E.A.6? A. We put in the pertinent ones, as much as we can remember, yes.

Q. Do you make any other notations concerning your observations? A. At times, yes. Notes are taken.

Q. Were there any notes that you took in this case? A. Yes.

Q. Have you read these D.E.A.6's prior to testifying? Yes, sir.

Q. You read the ones you filled out? A. Yes, sir.

Q. You read the ones that were filled out by other agents in this case? A. Yes, sir.

Q. Have you read all of the D.E.A.6's which are marked as Government Exhibits 3501 through, I believe, 3515 or thereabouts? A. At one time or another, yes, sir.

Q. And that was before you testified? A. Yes, sir.

Q. Have you reviewed your notes which you made, contemporaneous notes which you made? A. Whatever notes I could find, yes, sir.

Q. You reviewed those? A. Yes, sir.

Mr. Freedman: Your Honor, may I make a request for them? The notes referred to by the agent.

Mr. Batchelder: Your Honor, he has everything we have in our file. He has had it for three days.

The Court: Mr. Batchelder, the same rule goes for you as for the other lawyers. He wanted to know may he make a request. He doesn't need my permission to make requests.

Mr. Batchelder: I'm sorry, I thought you had granted the request.

The Court: The normal way of making requests is to walk over to the lawyer and ask him.

Q. Agent Bradley, do you have those notes? A. I believe I have some rough notes. Some I do, some I don't.

Q. Do you have the notes that you used to prepare your testimony? A. What I used for my testimony is right in front of Mr. Batchelder.

Q. Agent, didn't you indicate that you had some personal notes in addition to the D.E.A.6's? A. The notes that I am referring to are the ones that I used in order to prepare the 6's, which are there.

Q. So there are no other notes? A. If I looked in my desk I might find a rough, that is about it." (Tr. 72-74).

nection with the testimony of Agent Bradley.* In support of this motion, Lewis Friedman, Lopez's attorney, submitted an affidavit, the material allegations of which are as follows:

(1) he saw a piece of paper denominated a "document" with what appeared to be questions and answers on it;

(2) these questions appeared to be the same questions asked by the Assistant United States Attorney of the witness Bradley on the latter's examination;

(3) following these questions there were entries which reflected some of the same information regarding the surveillance to which Agent Bradley testified, in addition to notations as to 3500 exhibit numbers, and a direction to point out "J.D. No. 1" and

(4) the piece of paper contained the initials of the prosecutor. (Joint App. "F").

In response to this motion, the prosecutor filed a memorandum in which he stated that the document in question was a "traditional prosecutor's witness outline" which had been prepared "without Agent Bradley's assistance." The prosecutor offered to produce the document for the Court's review. (Joint App. "G").

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* Padron asserts in a footnote to his brief that Bradley was "the most important federal agent on the case" and supports this assertion by reference to another footnote where Bradley is described as "the first Government witness, the most important surveillance agent, and the chief Federal narcotics agent on the case." (Padron Br. at 3 n.2, and 10 n.10). These references ignore the plain fact that Detective Caracappa was the crucial witness in the case, and it was his testimony, in addition to the taped phone calls, which convicted these defendants.

Judge Pollack denied the motion by endorsement without a hearing, finding that all *3500* materials had been turned over to the defense prior to the Agent's testimony and that counsel was raising "a sham argument." (Joint App. "F"). The denial of this motion was clearly correct.

First, it was unnecessary for the District Judge even to have addressed the issue raised by the motion for new trial, since the defense had failed to inquire properly and in timely fashion concerning the existence of prosecutor's notes at trial. In both *Goldberg* v. *United States*, 44 U.S.L.W. 4424, 4426 (U.S. March 30, 1976) and *Campbell* v. *United States*, 365 U.S. 85 89 n.2 (1961), defense counsel had made specific inquiries of witnesses during cross-examination which led to responses indicating that notes of witness interviews had been taken which might fall within the scope of the Jencks Act. In that circumstance, the Court found in each case that sufficient questions had been raised by the witness' testimony to require a collateral inquiry to determine whether the notes constituted *3500* material. See 44 U.S.L.W. at 4429; 365 U.S. at 92.

However, as Mr. Justice Powell correctly observed in his concurring opinion in *Goldberg*, before a collateral inquiry can be required, the defendant must satisfy his "initial burden" of establishing "by probative evidence . . . that there is reason to believe that a statutory 'statement' may exist." 44 U.S.L.W at 4432. Absent questioning by defense counsel which focuses directly upon this issue and meets the threshold burden of showing that a statutory statement may exist, "the trial judge should deny the motion for production without a collateral proceeding." *Id.**

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* Of course, we do not suggest that, having made a timely motion for production of statements falling within § 3500, defense counsel must make appropriate inquiries in all cases before

[Footnote continued on following page]

Here, defense counsel asked not a single question of Agent Bradley concerning the preparation of any notes by the prosecutor. This failure to inquire, or decision not to inquire, whichever it was, of the witness about the existence of the notes precludes any assertion that the defendant was entitled to *3500* material which he never sought to identify.

Indeed, not only did defense counsel fail to make the appropriate inquiries during the cross-examination of the Agent, but also when his excursion to the prosecutor's table, during the jury's deliberations, led to his discovery of a witness sheet, he did not promptly raise the *3500* issue, which would have permitted an immediate and informed decision of the District Court. Instead, he waited a week to make a motion for a new trial.

Secondly, assuming *arguendo* that this material should have been furnished to the defense,* the defendants

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3500 material must be produced. However, in the case of prosecutor's notes, where the producibility of documents will often be disputed, such inquiries should be required. See *Goldberg* v. *United States, supra,* 44 U.S.L.W. at 4430 n.2 and 4432, n.12 (Powell, *J.*, concurring).

* The Government's supplemental appendix contains a copy of the document which we believe to have been seen by Lopez's attorney. (G. App. at A-3). The typed portion of the witness sheet, as is made clear by the prosecutor's post-trial memorandum and a letter furnished to defense counsel, dated May 21, 1976, which is also contained in the Government's appendix, was prepared by the prosecutor by distilling, without the assistance of Agent Bradley, the portions of Bradley's official reports which the prosecutor expected to elicit at trial. (G. App. at A-1). Subsequently, a copy of this distillation of Bradley's reports was given to Bradley, and he reviewed it prior to his testimony at trial. In connection with this review, Bradley made his own

[Footnote continued on following page]

could not possibly have suffered any prejudice. An examination of the witness sheet seen by Lopez's counsel, and the relevant notations contained therein, clearly shows that the document is nothing more than a distillation of information already contained in the official reports which were, in their entirety, turned over to the defense as *3500* material.* *Killian* v. *United States*, 368 U.S. 231, 243 (1961). In that circumstance, the document could have had no value to the defense as a tool for impeachment, and its production most certainly could not if "developed by skilled counsel . . . have induced a reasonable doubt in the minds of enough jurors to avoid conviction." *United States* v. *Hilton*, 521 F.2d 164, 166 (2d Cir. 1975).

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handwritten marginalia and added his own condensation, on the final page, of official reports concerning the arrests of Sintscha, Lopez, Padron, and Montiell.

Plainly, the preparation by the prosecutor of a witness sheet by distilling entries in official reports does not result in a statement of the witness. Even if this document could later be said to be approved or adopted by the witness, it is difficult to see why accurate condensations of lengthy reports which are themselves turned over as *3500* material of the witness—as was clearly the case here—should be considerd additional *3500* material. *Cf. United States* v. *Terrell*, 474 F.2d 872, 877 (2d Cir. 1973); *United States* v. *Tomaiolo*, 317 F.2d 324, 327 (2d Cir), *cert. denied*, 375 U.S. 856 (1963). The handwritten marginalia of the agent—as an examination of the document makes clear—are nothing more than brief jottings which duplicate in part the typewritten notes and can hardly be termed a "statement."

Finally, while the final page of the witness sheet contains brief handwritten notes of Agent Bradley which accurately distill, in part, the arrest reports of other agents, defense counsel elicited at trial that Agent Bradley had read these reports in preparation for trial (Tr. 73), and therefore defense counsel had an adequate opportunity to cross-examine Bradley about any inconsistencies between these reports and his testimony. *Cf. Rosenberg* v. *United States*, 360 U.S. 367, 371 (1959).

* The official agency reports from which the notations on the witness sheet were abstracted are contained in the Government's appendix. (G. App. at A-9 to A-36).

Moreover, the suggestion contained in defendants' briefs that the witness sheet may have been deliberately suppressed and that therefore a more stringent standard than the "skilled counsel" test is appropriate, see *United States* v. *Hilton*, *supra*, at 166, is totally belied by the nature of the document. It is incredible to believe that the prosecutor supplied the defense with agents' official reports (Tr. 73) and then intentionally suppressed a document which simply distilled some of these same reports.

POINT II

Lopez's motion to appear as co-counsel in his own defense was properly denied.

Four days prior to trial, Lopez moved the District Court for an order permitting his appearance as co-counsel in his own defense. (Joint App. "D" at 4). The motion was denied by Judge Pollack on the first day of the trial. (Joint App. "D", at final page). Relying on *Faretta* v. *California*, 411 U.S. 806 (1975), Lopez argues that the denial deprived him of an asserted Sixth Amendment right to appear as co-counsel. This claim is meritless.

A. There is no constitutional right to proceed as co-counsel

It has long been recognized in this Circuit that a trial judge has discretionary authority to permit a defendant to appear as co-counsel. See *United States* v. *Private Brands*, 250 F.2d 554, 557 (2d Cir. 1957), *cert. denied*, 355 U.S. 957 (1958); *United States* v. *Swinton*, 400 F. Supp. 805 (S.D.N.Y. 1975). Other circuits have similarly held that such representation is confided to

the discretion of the trial judge. *Lee* v. *Alabama*, 406 F.2d 466, 469 (5th Cir. 1968), *cert. denied*, 395 U.S. 927 (1969); *United States* v. *Conder*, 423 F.2d 904, 908 (6th Cir.), *cert. denied*, 400 U.S. 958 (1970); *United States* v. *Dellinger*, 472 F.2d 340, 408 (7th Cir. 1972), *cert. denied*, 410 U.S. 970 (1973); *Brasier* v. *Leary*, 256 F.2d 474, 476 (8th Cir.), *cert. denied*, 358 U.S. 867 (1958); *United States* v. *Klee*, 494 F.2d 394, 396 (9th Cir.), *cert. denied*, 419 U.S. 835 (1974); *Overholser* v. *DeMarcos*, 149 F.2d 23, 26 (D.C. Cir.), *cert. denied*, 325 U.S. 889 (1945).

The Supreme Court's decision in *Faretta* v. *California*, *supra*, did not transmute the discretionary power of a District Judge to permit a defendant to appear as co-counsel into a Sixth Amendment right. This issue was recently settled, when in rejecting a defendant's claim that he should have been permitted to act as co-counsel with his retained attorney, this Circuit observed that "*Faretta* . . . merely holds that a defendant may proceed to trial in a state criminal case without counsel where he voluntarily and intelligently elects to do so." *United States* v. *Wolfish*, 525 F.2d 457, 463 n.2 (2d Cir. 1975), *cert. denied*, — U.S.L.W. — (1976). While the defendant in *Wolfish* was found to have had a Sixth Amendment right to discharge his attorney and proceed *pro se*, it was held that he had no right to impinge on the functions and responsibilities of his attorney by acting as co-counsel. *Id.* at 463.

Other decisions in the federal courts since *Faretta* confirmed that there while there remains *discretionary authority* to permit a defendant to act as co-counsel, there is no *right*, constitutional or otherwise, to proceed as co-counsel. *United States* v. *Hill*, 526 F.2d 1019, 1023-25 (10th Cir. 1975); *United States* v. *Swinton*, 400 F. Supp. 805 (S.D.N.Y. 1975) (Pollack, *J.*). Nor does a right to proceed as co-counsel attach simply be-

cause the defendant is represented by appointed, rather than retained, counsel. *United States* v. *Hill*, *supra*, 526 F.2d at 1024.

B. Judge Pollack did not abuse his discretion in declining to appoint Lopez as co-counsel.

Not only was Lopez not entitled as a matter of right to act as co-counsel, but Judge Pollack also cannot be faulted, as a matter of discretion, for declining to confer this status upon him.

Lopez proffered no reason or justification whatever for being permitted to proceed as co-counsel. No claim was made, for example, that a lack of communication between Lopez and his attorney was interfering with the presentation of an effective defense. See *United States ex rel. Martinez* v. *Thomas*, 526 F.2d 750, 753 (2d Cir. 1975). There were no allegations of incompatibility of counsel and client, nor any extrinsic evidence of this. *United States* v. *Abbamonte*, 348 F.2d 700, 704 (2d Cir. 1965), *cert. denied*, 382 U.S. 982 (1966). There was only the affidavit of Lewis R. Friedman, Lopez's appointed counsel, which offered the hearsay assurance that the defendant would not disrupt the proceedings if allowed to proceed as requested. The defendant himself offered no affidavit at all containing the reasons he felt it necessary or beneficial to act as co-counsel. There was, in short, nothing before the trial court which would justify a conclusion that the interests of justice would be served by Lopez serving as his own attorney.

Confronted with a request for relief supported by no recitation of fact or reason, Judge Pollack properly declined to confer co-counsel status on Lopez. Echoing the words of the Supreme Court in *Faretta*, *supra*, 422 U.S.

at 834-35, that defendants will be better protected in the overwhelming number of cases by the representation of trained counsel, Judge Pollack has recently observed:

> "It is likely that the interests of justice will only rarely be served by a defendant's supplementation of the legal services of his retained counsel." *United States* v. *Swinton, supra*, 400 F. Supp. at 806.

In light of (1) the policies which militate against *pro se* representation, *cf. United States ex rel Martinez* v. *Thomas, supra*, 527 F.2d at 755; *United States* v. *Dougherty*, 473 F.2d 1113, 1125 (D.C. Cir. 1972); and (2) the failure to articulate any justification for the hybrid representation sought in the instant case, Judge Pollack clearly acted properly in denying co-counsel status to Lopez.

POINT III

The trial court's charge was in all respects proper.

A number of complaints are raised concerning Judge Pollack's charge. Specifically, Sintscha contends that the trial court incorrectly charged the jury on the subject of the Government's use of informants and impermissibly commented on the lack of evidence supporting Sintscha's defense of entrapment. Padron claims that the trial court's charge on the general dangers of conspiracy was error. These contentions, each of which is said to require reversal, are without foundation.

A. Judge Pollack's charge concerning the use of informants.

Sintscha defended against the charges made below on the theory that he was entrapped both by agents of the Drug Enforcement Administration and by an informant

named "Pat". (Tr. 352, 413-15, 421, 423-25). Judge Pollack charged the jury as follows:

> "Now there has been testimony before you with respect to the use by the narcotic agents of the services of an informant or an informer. Whatever you think of informers, the government uses them in order to get leads to those who are violating the law, and this is entirely proper. Whether you and I disapprove of that really is beside the point, provided that such services in no wise infringe upon the rights of the defendant, because the use of such services is not forbidden by law. You are not being asked to determine whether or not you agree with the policy endorsing the use of informants.
>
> Putting it another way, if you are satisfied beyond a reasonable doubt, as I have already defined reasonable doubt to you, that the defendants committed the offenses as charged in the indictment, you may find them guilty, even though you believe their apprehension came about in some measure by the government availing itself of the services of an informant." (Tr. 472).

This instruction was followed by a perfectly correct and eminently fair charge on the defense of entrapment.*

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* That portion of the charge read as follows:

"Defense counsel has urged a defense of entrapment and it has been mentioned in the summations, and I will now advise you as to what that term of law means and what it does not mean. The fact that I instruct you on this subject does not mean that I believe there is any evidence to sustain such an offense. I give you the instruction as the legal guide on the subject. You will have to say what the facts and circumstances in evidence add up to.

Entrapment exists only when a government agent or agents induce and originate the commission of a crime without the aid

[Footnote continued on following page]

Sintscha argues that Judge Pollack's charge on the permissible use of informants was unwarranted because, first, there was no evidence in the record from which it could be concluded that it was the "policy" of the Government to utilize informants and, second, by instructing the jury that the use of informants was permissible, the defendant was deprived of "his only defense," *i.e.*, entrapment. These arguments are frivolous.

The Court's obviously proper charge on informants, one given by trial judges in the Southern District of New York for many years, derives in part from the opinion of Judge Learned Hand in *United States* v. *Dennis*, 183 F.2d 201 (2d Cir. 1950), *aff'd*, 341 U.S. 494 (1951):

> "Courts have countenanced the use of informers from time immemorial; in cases of conspiracy, or in other cases where the crime consists of preparing for another crime, it is usually necessary to rely upon them or upon accomplices because the criminals will often proceed covertly." 183 F.2d at 224, *quoted with approval in Hoffa* v. *United States*, 385 U.S. 293, 311 (1966).

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of any prior criminal intent or purpose on the part of the defendant. There is no entrapment when the criminal intent or purpose is already present and the agent or agents merely afford the opportunity for the commission of the crime and seek to apprehend the perpetrator. When the criminal design originates with officials of the government and they implant in the mind of an innocent person the disposition to commit the alleged offense and induce its commission by solicitation, proposition, suggestion or the like in order that they might prosecute, the defense of entrapment arises.

However, you must bear in mind, and I instruct you as a matter of law, that it is a valid reply to a contention of entrapment if the government has satisfied you beyond a reasonable doubt that the defendant was ready and willing to commit the offense when such an opportunity was afforded by government officials. You must be satisfied beyond a reasonable doubt that the government did not seduce an otherwise innocent person, but only provided the means for the accused to realize a pre-existing purpose." (Tr. 472-74).

The charge did nothing more than advise the jurors that the use of informants was not, without more, an infringement on the rights of the defendant. *See Hoffa* v. *United States*, *supra*, at 311 ("... [T]he use of informants is not *per se* unconstitutional.") This standard charge continues to serve the important function of alerting those jurors for whom the term "informer" creates impressions which adversely reflect upon the Government's case that the use of informants is not *per se* improper.

The argument that this charge was error because there was no evidence in the record to support it is specious. This charge—about which there can not be any true factual dispute—has passed from the area of disputation to the point where it is a recognized postulate of criminal law not requiring proof in every case. *Cf. United States* v. *Bartlett*, 449 F.2d 700, 705 (8th Cir. 1971), *cert. denied*, 405 U.S. 932 (1972). But in any event, that the use of informants is merely one of many undercover techniques to which narcotics enforcement agents have resorted for years has recently been commented upon by the Supreme Court:

> "The illicit manufacture of drugs is not a sporadic, isolated criminal incident, but a continuing, though illegal, business enterprise. In order to obtain convictions for illegally manufacturing drugs, the gathering of evidence of past unlawful conduct frequently proves to be an all but impossible task. Thus in drug-related offenses law enforcement personnel have turned to one of the only practicable means of detection: the infiltration of drug rings and a limited participation in their unlawful present practices. Such infiltration is a recognized and permissible means of investigation. . . . Law enforcement tactics such as this can hardly be said to violate 'fundamental

> fairness' or 'shocking to the universal sense of justice'." *United States* v. *Russell*, 411 U.S. 423, 432 (1973) (citation omitted).

Accordingly, even assuming proof in the instant case were necessary, Judge Pollack could certainly be found to have properly taken judical notice of this well-established fact during the course of his charge. Fed. R. Evid. 201.

Equally unpersuasive is the suggestion that this charge deprived the defendant of his only defense. The charge did nothing more than instruct the jury that the use of informants was not *per se* violative of the defendants' rights—a correct statement of law. The Court then went on to explain that the use of an informant could be found to have violated the defendants' rights if they had been entrapped, thereby providing the defendants with the only charge on their defense to which they were entitled.

But even if there were error in the charge—a proposition with which we strenuously disagree—, there was no timely objection to this portion of the charge. The jury commenced its deliberations at 11:00 A.M. (Tr. 488). Sintscha's attorney did not file his objection to this portion of the charge (Court's Exhibit 20) until 3:10 P.M., although the time noted on the written objection is "2:15." (Tr. 491-92). The objection reads as follows:

> "Request on behalf of Sintscha 75 Cr. 938 that jury be instructed to omit from its consideration instruction to the effect 'that the government generally use [*sic*] informants to catch or apprehend people involved' or however the instruction was worded."

The judge declined to supplement his instructions "at this late hour." (Tr. 492).

It was clearly within Judge Pollack's discretion to deny Sintscha's untimely motion to have the jury reinstructed on the subject of the Government's use of informants, even assuming Sintscha's motion had merit. *United States* v. *Valdes*, 417 F.2d 335, 339 (2d Cir. 1969), *cert. denied*, 399 U.S. 912 (1970); *Johnson* v. *United States*, 484 F.2d 310 (8th Cir.), *cert. denied*, 414 U.S. 1039 (1973). For the defendant had failed to comply with the salutary strictures of Rule 30 of the Federal Rules of Criminal Procedure, which provides that "no party may assign as error any portion of the charge . . . unless he objects before the jury retires to consider its verdict. . . ."

B. Judge Pollack did not comment on the evidence, or lack thereof, supporting Sintscha's entrapment defense.

Sintscha further argues that Judge Pollack impermissibly imposed his view of the evidence on the jury by prefacing his instruction on entrapment as follows:

> Defense counsel has urged a defense of entrapment and it has been mentioned in the summations, and I will now advise you as to what that term of law means and what it does not mean. *The fact that I instruct you on this subject does not mean that I believe there is any evidence to sustain such an offense.* I give you the instruction as a legal guide on the subject. You will have to say what the facts and circumstances in evidence add up to." (Tr. 472-73) (emphasis added).

When the emphasized portion of this instruction is read in context, it is clear that the judge's instruction was scrupulously fair and merely sought to clarify the fact that a judge does not validate the assertion of a defense (or, for that matter, a Government contention)

by instructing the jury on it. Indeed, at the very outset of his charge, the trial judge had instructed the jury:

> "It is neither my intention nor my function to favor one side or the other or to imply that I have any views as to the credibility of any of the witnesses or as to the guilt or innocence of any of the defendants. That is your sole and exclusive function." (Tr. 446).

Finally, the fact that the defense never raised any objection to this portion of the charge not only constitutes a waiver, but is also forceful evidence that this passing remark of the trial judge, now assigned as so plainly prejudicial, was not understood below as a comment on the lack of evidence supporting the defendant's defense of entrapment. See *United States* v. *Goldberg*, 527 F.2d 164, 173 (2d Cir. 1975); *United States* v. *Pinto*, 503 F.2d 718, 723-24 (2d Cir. 1974); *United States* v. *Carson*, 464 F.2d 424, 432 (2d Cir.), *cert. denied*, 409 U.S. 949 (1973); *cf. United States* v. *Canniff*, 521 F.2d 565, 572 (2d Cir. 1975), *cert. denied*, as *Penigno* v. *United States*, — U.S.L.W. — (1976).

C. There was no error in the conspiracy charge.

Finally, Padron claims, without citation to a single authority, that the charge of the trial court on the dangers of conspiracy constituted error, because "the effect of the comment was to make it appear to the jurors that condemnation of the crime of conspiracy was more important than condemnation of other crimes and that they therefore had a greater obligation to convict persons accused of conspiracy than to convict persons charged with other crimes." (Padron Br. at 13).

Judge Pollack, in explaining to the jurors why Congress had made conspiracy to commit a substantive offense a separate and distinct crime, charged as follows:

> "A conspiracy which sometimes is referred to as a partnership in crime is so referred to because it involves collective or organized action, presents a greater potential threat to the public interest than the illicit activity of a single individual. Group association or organized activity renders detection more difficult than the instance of a single or lone wrongdoer. It was for these reasons and other reasons that Congress made a conspiracy or concerted action to violate a general law a crime, entirely separate, distinct and different from the violation of the law or laws which may be the objective of the conspiracy." (Tr. 455-56).

Despite Padron's claims of prejudice, Judge Pollack neither stated nor suggested in this instruction that the jurors' assessment of the guilt or innocence of the defendants should be affected in the slightest by the nature of the crimes with which they were charged. To the contrary, he advised them that they were to approach their deliberations fairly and impartially, without prejudice for or against the defendants (Tr. 444-45); that guilt was personal, to be determined only on the evidence or the lack thereof (Tr. 450, 475); that the Government had the burden of proving guilt beyond a reasonable doubt (Tr. 450-53); and that the Government had this burden with respect to each and every element of the conspiracy charge. (Tr. 461).

The plain purpose of this standard conspiracy charge, which followed on the heels of the Court's explanation that a conspiracy was a crime discrete from the substantive crime which was the object of the conspiracy (Tr. 455), was to explain why a conspiracy is and properly *should be* treated in the law as a separate offense. Without such an instruction jurors might well believe that the Government had charged the defendants with the same

crime twice or that the Government was engaging in some kind of discriminatory overkill as to defendants named both in substantive counts and the conspiracy count. This instruction clearly states the rationale of conspiracy for jurors who might otherwise question the fairness of convicting a defendant of a substantive offense and also the agreement to commit that offense.

The charge delivered in the instant case derived, in large part, from language in the Supreme Court's opinions in *United States* v. *Rabinowich*, 238 U.S. 78 (1914) and *Callanan* v. *United States*, 364 U.S. 587 (1961):

> "For two or more to confederate and combine together to commit or cause to be committed a breach of the criminal laws, is an offense of the gravest character, sometimes quite outweighing, in injury to the public, the mere commission of the contemplated crime. It involves deliberate plotting to subvert the laws, educating and preparing the conspirators for further and habitual criminal practices. And it is characterized by secrecy, rendering it difficult of detection, requiring more time for its discovery, and adding to the importance of punishing it when discovered." 238 U.S. at 88.
>
> * * * * *
>
> "This settled principle derives from the reason of things in dealing with socially reprehensible conduct: collective criminal agreement—partnership in crime—presents a greater potential threat to the public than individual delicts. Concerted action both increases the likelihood that the criminal object will be successfully attained and decreases the probability that the individuals involved will depart from their path of criminality. Group association for criminal purposes often, if not normally, makes possible the attainment of ends more complex than those which one criminal

> could accomplish. Nor is the danger of a conspiratorial group limited to the particular end toward which it has embarked. Combination in crime makes more likely the commission of crimes unrelated to the original purpose for which the group was formed. In sum, the danger which a conspiracy generates is not confined to the substantive offense which, is the immediate aim of the enterprise." 364 U.S. at 593-94.

See also Iannelli v. *United States*, 420 U.S. 770, 778-79 (1975). Instructions similar to those given in the instant case were found not to be grounds for reversal in *United States* v. *Lozaw*, 427 F.2d 911, 916 (2d Cir. 1970).

In light of the proper purpose which this instruction served and Judge Pollack's repeated instructions that the guilt or innocence of the defendants was to be decided with reference only to the evidence, the defendants plainly could have suffered no prejudice. *United States* v. *Lozaw*, *supra*, at 917.

CONCLUSION

The judgments of conviction should be affirmed.

Respectfully submitted,

ROBERT B. FISKE, JR.,
United States Attorney for the Southern District of New York, Attorney for the United States of America.

THOMAS E. ENGEL,
LAWRENCE B. PEDOWITZ,
Assistant United States Attorneys,
Of Counsel.

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AFFIDAVIT OF MAILING

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THOMAS E. ENGEL, being duly sworn, deposes and says that he is employed in the office of the United States Attorney for the Southern District of New York.

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* Darnell J. Blackett, Esq.
401 Broadway
New York, N. Y. 10013